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In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2002

Barbara GRUTTER, Petitioner
v.
Lee BOLLINGER, et al.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF PARTIES IN AMICUS CURIAE FROM MEMBERS AND FORMER MEMBERS OF THE PENNSYLVANIA GENERAL ASSEMBLY AND PENNSYLVANIA CIVIC LEADERS IN SUPPORT OF RESPONDENTS

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State Senator, and Former President Pro Tempore of the Senate, Robert C. Mellow

State Senator Vincent Hughes
State Senator Shirley Kitchen
State Senator Allison Schwartz
State Representative Linda Bebko-Jones
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State Representative Thomas Caltagirone
State Representative Mark Cohen
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State Representative Lawrence Curry
State Representative Frank Dermody
State Representative Dwight Evans
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State Representative Michael Horsey
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State Representative Frank Oliver
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State Representative Joseph Preston
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State Representative Michael Sturla
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State Representative Leanna Washington

PARTIES IN AMICUS CURIAE (continued)

State Representative Ronald Waters
State Representative Jewell Williams
State Representative Jake Wheatley, Jr.
State Representative Rosita Youngblood

Former State Senator Hardy Williams
Former State Representative, and current Mayor of the City of Harrisburg, Stephen R. Reed
Former State Representative Joseph Rhodes

Jerome Mondeshire, President, Philadelphia NAACP
Rev. Robert P. Shine, Sr., President, State Coalition of Black Clergy, Commonwealth of Pennsylvania

QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment to the U.S. Constitution allows colleges and universities to determine their own standards for matters within their distinctive competence, such as the admission of students through programs which seek to encourage diveristy in order to improve the eucation of all students through greater discussion and debate of ideas?

2. Whether the Fourteenth Amendment to the U.S. Constitution allows diversity to be considered to be a compelling state interest, and allows African-Americans to be considered a narrowly tailored classification of people?

3. Whether remedies suggested by the Solicitor General and the State of Florida constitute constitutional regression in the direction of Plessy v. Ferguson?

Suggested answer to all of the above: Yes.

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TABLE OF AUTHORITIES

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Elizabeth Wolfe, "GOP Courting Blacks
for Hill Jobs," Washington Post,
January 29, 2003. 4

G.Orfield and E.Miller, Chilling Admissions, 1998 8

http://www.ethnicmajority.com/racial_profiling.htm 20

IMsight News (http://www.im-na.com) 15

"Is America Integrated?", History News
Network, Center for History and New Media,
http://hnn.us/articles/1174.html 16

Jerry Bobrow, Ph.D., Barron's How to
Prepare for the LSAT, 10th Ed., 2002 29

Steinhorn, Leonard, book By the Color of
our Skin: the Illusion of Integration and
the Reality of Race, 1999 16

U.S. Dept. of Energy, Final Report of the
Task Force Against Racial Profiling, January 2000 20

I INTEREST OF PARTIES IN AMICUS CURIAE

This brief in Amicus Curiae in support of Respondents is filed pursuant to Rule 37 of the Rules of this Court. Counsel for petitioners and respondents have consented to the filing of this brief; their consent letters have been filed with the Clerk of the Court. [1]

Petitioners in Amicus Curiae, all leaders of and in the Commonwealth of Pennsylvania – Caucasian, African-American and Latino – fully support the admissions policies of the University of Michigan School of Law and urge the Supreme Court of the United States to issue a clear and unequivocal opinion in support of diversity in higher education as a compelling state interest and the inclusion of African-Americans as a narrowly-tailored category, as well as the First Amendment rights of the University of Michigan School of Law to choose its own student body.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party in this case in whole or in part authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution for the preparation or submission of this brief.

Working in a fully diverse institution, the Pennsylvania Legislature, Petitioners have had first-hand experience with the benefits of diversity in provoking thought and improving decision-making. Petitioners believe that educational diversity programs have led to expansion of student populations and not a reduction of opportunities for those who are not minorities.

Petitioners fear that the jettisoning of the University of Michigan School of Law plan will lead to the steady erosion of educational opportunities for African-Americans and other minorities throughout the United States.

If there is going to be a search for non-quota programs that somewhat resemble quotas because they produce a "critical mass" of African-American students year after year, it is hard to see where the litigation process will end.

Future cases could easily target groups disproportionately composed of African-Americans and seek to hold that these categories are not truly racially neutral.

These fears are heightened by a reading of numerous amicus curiae briefs filed against the University of Michigan petition. Amicus brief after amicus brief makes clear the total

opposition to any diversity program that will increase the percentage of African-Americans. A U.S. Supreme Court decision holding that the 20 points given to African-American applicants violates the Fourteenth Amendment, and that colleges and universities should use racially neutral methods in diversity programs, will merely open the floodgates to numerous instances of litigation alleging that one category or another is not truly racially neutral.

The flood of cases that will ensue will also threaten the existence of alumni preference programs and geographical outreach programs, as many of these categories severely under-represent African-American applicants.

The ramifications of this case could extend into all areas of Civil Rights law. The amicus curiae brief of the Equal Opportunity Advisory Council, submitted by Jeffrey A. Norris and Elizabeth Reesman (Jan 16, 2003) in support of neither party warns in great detail of the wide spread potential ramifications on American business of a broadly written decision curbing diversity programs.

Even the internal hiring policies of the United States Congress could be affected by a ruling adverse to the University of Michigan. On January 28, 2003, for instance, House Majority Leader Tom Delay (R-Texas) said his party's members will focus on hiring more minorities for their staffs. (Elizabeth Wolfe, "GOP Courting Blacks for Hill Jobs," Washington Post, January 29, 2003.)

Neither the University of Michigan School of Law nor the U.S. House Republican Caucus should have to prove intentional discrimination by previous or current leaders in order to seek a diverse body of students or workers to better fulfill their respective missions. Only the institutions involved – not outside affected interests, no matter how large their stake – are permitted to offer remedial justifications for racial classifications to satisfy strict scrutiny standards under the Fourteenth Amendment.

A ruling against the University of Michigan School of Law could ultimately lead, for instance, to suits against Mr. Delay by Caucasian rejected applicants because he publicly announced his intention to hire African-Americans instead of

issuing a racially neutral plan to, for instance, hire more residents of large cities. And even if Mr. Delay had said that his goal was to hire more residents of large cities, some parties in amicus curiae would argue that since residents of large cities are disproportionately African-American, that hiring would be functionally the same as a prohibited quota.

Petitioners believe that the shortage of African-Americans in law school classrooms and the legal profession is a great disadvantage to legal education in the United States. To effectively mandate the reduction of African-American students at the University of Michigan School of Law by 75% according to the University of Michigan's own calculations, would only further restrict black/white interaction and understandings in classrooms, offices, and courts throughout the United States.

II SUMMARY OF THE ARGUMENT

The findings of fact by the Trial Court below should be carefully considered before the circuit court decision is overturned. Diversity in American institutions of higher education and American workforces is a compelling state (and

national) interest allowing racial classifications to achieve it. African-Americans are a narrowly-tailored group of people with diverse cultural and life experiences whom the University of Michigan School of Law has a compelling state interest in admitting. Universities have First Amendment rights to structure their admissions policies to produce greater discussion and debate of ideas. Remedies suggested by the Solicitor General constitute a constitutional regression in the direction of Plessy v. Ferguson 163 US 537 (1896) as they reward the choice of low prestige schools by African-Americans.

III THE FINDINGS OF FACT BY THE TRIAL COURT THAT GRADE POINT AVERAGE, LSAT SCORES, AND ALUMNI ADMISSIONS PREFERENCES ARE ALL FACTORS OF LOW PREDICTABILITY OF LAW SCHOOL AND OCCUPATIONAL SUCCESS WHICH OPERATE TO KEEP OUT MINORITIES SHOULD BE CAREFULLY CONSIDERED BEFORE THE CIRCUIT COURT DECISION IS OVERTURNED

Judge Bernard A. Friedman conducted extensive hearings on the broader issues involved in this case. (See Grutter v. Bollinger, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001). He heard testimony from Harvard Professor Gary Orfield who

noted that Michigan has the highest percentage (64%) of black students attending schools whose student populations are 90% - 100% minority. Judge Friedman noted that:

> Professor Orfield testified that racial segregation in the schools is related to segregation in housing, and he characterized housing in Detroit as "hyper-segregated." Further, Professor Orfield indicated that segregation in schools is associated with high levels of poverty which, in turn, are associated with poor resources and decreased educational opportunities and as a rule, the poorest schools are the ones with the highest minority population. See Exhibit 197. Two-thirds of African-American and 70% of Hispanic children attend segregated schools. Professor Orfield testified that, as a result, most minority students do not receive a public education that prepares them for college. (p.62, Civil Action No, 97-CV-95928DT)

Judge Friedman also quotes Professor Orfield on the effects of reversing affirmative action:

> The reversal of affirmative admissions in higher education can drastically reduce black, Latino, and American Indian enrollment on selected campuses. The increased use of tests and grades as entrance standards will tend to exacerbate the existing inequities in U.S. society. If affirmative action is outlawed nationally, as it has been in Texas, the impact on access to leading public and private universities would be enormous. Many of our most able students would find themselves on campuses overwhelmingly dominated by white and Asian students. The severe isolation characteristic of our more affluent suburbs would become the rule in the institutions that train the leaders of our societies and our professions. This threatens critical education functions

of universities and their ability to fully serve their communities. (P.65, op cit.: Exhibit 167-d, G.Orfield and E.Miller, Chilling Admissions, p.14, 1998.)

Also testifying before Judge Friedman was Jay Rosner, the Executive Director of the San Francisco office of the Princeton Review Foundation. The Princeton Review Foundation focuses on providing courses of LSAT preparation to under-represented minority students.

Judge Friedman summarizes Mr. Rosner's testimony as follows:

> Mr. Rosner's expert reports were admitted as Exhibits 168 and 169. He testified that the LSAT is developed and administered by the Law School Admission Council (LSAC), which claims that the LSAT score helps predict students' first year grades in law school. However, according to Mr. Rosner, the actual correlation is only 16% - 20% which is to say that 80% - 84% of first year law school grades are not predicted by the LSAT. Mr. Rosner stated that test preparation courses like those offered by the Princeton Review, or by its competitor Kaplan, Inc., generally improve one's LSAT scores by approximately 7%.... He also testified that despite PRF's outreach efforts, the vast majority of the students who take an LSAT preparation course are white, and that this fact accounts for some of the test-score gap between minority and non-minority students. (p.68)

Judge Friedman also heard from Martin Shapiro, a professor of psychology at Emory University, who testified on

the issue of bias in standardized testing. Judge Friedman notes that:

> Professor Shapiro testified that standardized admission tests, by the manner in which new questions are "pre-tested," tend to perpetuate bias against groups which have performed poorly on the tests in the past. He also noted the large difference between the average LSAT score for whites and blacks, and the weak correlation, of about 27%, between performance on the LSAT and first-year law school grades. (pp.68-69)

Judge Friedman heard testimony from David White, Director of Testing for the Public, a group which offers test preparation courses for women and minority students. White showed that while 46% of white law school applicants in 1996 –1997 scored at or above 155 on the LSAT, only 8% of black applicants did so. While 46% of white applicants had an undergraduate grade point average of 3.25 or above, only 17% of black applicants did so. And while 27% of white applicants scored at or above 155 on the LSAT and had an undergraduate grade point average of 3.25 or above, only 3% of black applicants had both. (p.69)

Finally, Judge Friedman quotes Professor Richard Lempert, a member of the faculty of the University of

Michigan School of Law, as well as a member of the sociology department at the University of Michigan. A report submitted by Professor Lempert said that:

> "we find no significant relationship between the LSAT or UGPA and what matters more – the achievement of students after graduation. Drawing on work done in connection with the affirmative action lawsuit against the University of Michigan Law School, we can also say that had the LSAT and the UGPA been the only criteria for admission at Michigan, few of Michigan's minority graduates would have been admitted to the school, even though their career success since law school is similar to the career success of Michigan's white graduates and consistent with the aspirations Michigan has for all the students it admits." (p.72-73)

Judge Friedman notes Lempert's conclusion that if affirmative action admissions did not exist, the number of under-represented minorities admitted to any law school in the country would be reduced by 75%. (p.73)

From these and other witnesses, Judge Friedman draws conclusions that minorities do poorly in the LSAT because the tests are written in "academic English" and they are less likely to take LSAT preparation courses. Judge Friedman concludes that "the answer is not to retain the unconstitutional racial classification but to search for lawful solutions, ones that treat

all people equally and do not use race as a factor." (p.85)

Judge Friedman says:

> One such solution may be to relax, or even eliminate reliance on the LSAT. The evidence presented at trial indicated that the LSAT predicts law school grades rather poorly (with a correlation of only 10-20%) and that it does not predict success in the legal profession at all. (p.85)
>
> Another solution may be for the law school to relax its reliance on undergraduate GPA. The law school's admissions policy acknowledges that, even in combination, the LSAT score and undergraduate GPA are 'far from perfect' predictors of success in law school. In fact, the policy asserts that the correlation between the indexed score and first-year law school grades is merely 27%.... (p.87)
>
> Another solution may be for the law school to reduce or eliminate the preferenc now given to the sons and daughters of University of Michigan alumni.... Common sense would suggest that a preference of this nature perpetuates past imbalances and has no connection to any measure of 'merit.'" (p.87)

The radicalism of Judge Friedman's suggested solutions to the problem of how to allow significant number of minority students to enroll in the University of Michigan's School of Law, when the school is forced to operate under his restrictive interpretation of the Fourteenth Amendment, places in bold

relief the moderate approach of Justice Powell's opinion in Bakke.

Under Justice Powell's decision, it is not necessary for law school admissions practices for all students to be radically changed. All that is necessary is that the court recognize the well-documented facts, agreed to by Judge Friedman, that the current law school admissions criteria are only marginally relevant to predicting either law school success or success in the legal profession, and they greatly undercount the qualifications of minority applicants. Accepting his findings should lend this Court to allow law schools to exercise their own discretion in choosing students, within the scope of the First Amendment. The U.S. Supreme Court should also conclude that a balancing of standards that "discriminate" for and against minority applicants also is allowable under the Fourteenth Amendment because the net effect of the conflicting standards is racial neutrality.

IV DIVERSITY IN AMERICAN INSTITUTIONS OF HIGHER EDUCATION AND AMERICAN WORKFORCES IS A COMPELLING STATE (AND NATIONAL) INTEREST ALLOWING RACIAL CLASSIFICATIONS TO ACHIEVE IT

The Amicus Curiae brief of the Equal Employment Advisory Council outlines the case for diversity as a compelling state (and national) interest. The Equal Employment Advisory Council – a nationwide association of employers organized in 1976 – now includes approximately 340 of the nation's largest private-sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunities.

The Equal Employment Advisory Council argues that diversity in higher education is essential to employers in meeting their business-related diversity needs. Demographic changes translate to diversity in the consumer population. Entering the global marketplace creates a need for diversity skills. Workforce diversity improves internal performance. Workforce diversity improves the "bottom line." Student body diversity in higher education contributes significantly to companies' efforts to meet their needs for workplace diversity.

Successful employees and employers of the twenty-first century must understand and feel comfortable with people of diverse backgrounds. The case made by the Equal Employment Advisory Council – composed of representatives of employers representing over one-seventh of the total American workforce – should be reviewed very seriously by this Court.

V AFRICAN-AMERICANS ARE A NARROWLY-TAILORED GROUP OF PEOPLE WITH DIVERSE CULTUTAL AND LIFE EXPERIENCES WHOM THE UNIVERSITY OF MICHIGAN SCHOOL OF LAW HAS A COMPELLING STATE INTEREST IN ADMITTING

African-Americans are a narrowly-tailored classification of people. Regardless of advances in American law and in economic status, African-Americans are a clearly identifiable group of people whose identity to themselves and to others as African-Americans is often clearer and more influential in determining the reactions of others than the identities of innumerable personal characteristics.

There are numerous ways to classify people, and African-American individuals fall into many different classifications. But often they will fall into these

classifications with far different distributions than will members of other races.

To probe deeply into the belief system of each law school applicant in order to produce an intellectually diverse class – as recommended by some parties in amicus curiae – would violate the First Amendment. To have law schools engaging in analysis of an applicant's belief system of political, religious, moral, ethical, social or economic issues in order to ensure intellectual diversity would be a broad, intrusive and invasive violation of any sense of privacy and freedom of opinion under the First Amendment.

Law schools have traditionally used the far less intrusive measurement of experiences of one sort or another instead of beliefs in order to classify students. Being an African-American is likely to create experiences, friendships, and exposure to ideas that are different in many cases from those of many or most non-African-Americans.

Internet searches are one source of documentation for the cultural and experiential differences of African-Americans. For instance, *IMsight News* reports for the fourth quarter of

2001 that thirteen of the top twenty television programs among African-Americans were different from the top twenty television programs among whites.

(See: http://www.im-na.com)

Leonard Steinhorn, professor of communications at American University and co-author of the book By the Color of our Skin: the Illusion of Integration and the Reality of Race (1999), lists a variety of experiential differences between African-Americans and Caucasians:

> Nine in ten black church members belong to black denominations, and most whites never see a black face in the pews. Social clubs, nightlife, entertainment, barber shops, hairdressers, vacations, and even ones choice of doctors are often determined by race. One Chicago study found that middle class blacks and whites both enjoy museums and concerts, but rarely the same ones.... Nearly half of all blacks read the magazines Ebony and Jet, but fewer than one in a hundred whites will ever pick one of these up. Blacks and whites are even gravitating towards different sports. Soccer is non-black and baseball is increasingly becoming so; ice hockey, field hockey, swimming and tennis are virtually all-white; basketball and football are already predominantly black; and in track and field, long-distance running attracts whites while blacks cluster in the speed events.... ("Is America Integrated?", History News Network, Center for History and New Media, http://hnn.us/articles/1174.html , pp.2-3)

Neither law nor customary practice has mandated that universities limit their determination of merit to test scores and grade point averages. A decision of the U.S. Supreme Court ordering admissions to be made solely on the basis of test scores and grade point averages would be revolutionary in its impact as to which Caucasian students are admitted, as well as to which African-American students are admitted. Competitive university admissions have long allowed for different measures of excellence in the same class of students.

Despite their numerical specificity, grade point average and test scores are widely believed to be – at least in part – subjective measures. Parental income is an excellent predictor of test scores. Those who have significant family discretionary income are more likely to afford tutoring services to boost both grades and test scores. Universities – for their own long-term financial stability – have to be able to take a number of students whose families can afford to pay full tuition if they are to be able to give scholarships to those families who cannot pay full tuition.

Those with the strongest work ethic may be somewhat narrow as individuals. Educational institutions have long valued intangible factors of personality, personal achievement, rare and balancing perspectives, and alumni ties, long before any form of affirmative action was used in admissions.

The reason for this has been that similarity of experience is often correlated with similarity of thought. Walter Lippman's epigram – "When everyone thinks alike, no one thinks very much" – summarizes the attitude of many college and law school officials.

The academic discipline of the law – no less than argumentation before the U.S. Supreme Court or any court – is about the clash of perspectives that comes from the intermixture of ideas, client interests, and legal precedents.

The state of Michigan has a strong state interest in having the best-trained lawyers possible in the twenty-first century. There is widespread agreement that educational diversity increases the competence of all participants in both formal and informal educational processes.

The differential experiences and exposures of African-Americans are of far greater relevance to the study of law than are categories such as living in the Upper Peninsula of Michigan, alumni preference, or dazzling musical ability.

The legal status of African-Americans has long been a matter of legal contention, while the status of most social groups has not been legally contested.

African-Americans – as a group and in many cases as individuals – have been exposed to the discriminatory application of American law in a way that no other group of American citizens has.

African-Americans have a unique background which may lead them – or fellow students interacting with them – to insights on the functioning and evolution of American law. The fact that each African-American has unique views and experiences does not preclude some African-Americans from having among them people with different insights into the law than do people of other races. Even when their views are similar to those of some Caucasians, they may differ in intensity, passion, and personal experience.

Racially neutral laws have had disparate impacts on African-Americans. African-Americans have been far more likely to have been arrested and convicted for many types of crime – despite doubts among many that the percentage of African-Americans committing the crimes is anywhere near the percentage of African-Americans convicted.

To cite recently well-publicized examples, African-Americans have been far more likely to have been stopped without cause for suspected shoplifting or automobile-related crimes. The stopping of Black motorists without adequate cause has become so common it has been labeled as the offense of "Driving While Black." (See: Driving While Black -- Racial Profiling On Our Nation's Highways, by David A. Harris, University of Toledo College of Law An American Civil Liberties Union Special Report, June 1999. See also: U.S. Dept. of Energy, Final Report of the Task Force Against Racial Profiling, January 2000. See also: http://www.ethnicmajority.com/racial_profiling.htm)

The far greater proportionate African-American experience with the criminal justice system certainly

contributes to law school discussions. A much higher percentage of African-Americans have friends or family members incarcerated than do Caucasians.

The laws allowing slavery, mandating removal of ex-slaves from slave territories, and mandating various forms of segregation and exclusion from the rest of society were not racially neutral. African-Americans are far more likely to consume media dealing with these subjects, far more likely to have family histories relevant to these subjects, and therefore far more able to contribute valuable insights to discussions with fellow students and faculty members.

Diversity creates value for all. Caucasians benefit from exposure to ideas of African-Americans just as African-Americans benefits from exposure to ideas of Caucasians. Even when ideas are not unique to African-Americans, the fact that they may be held by African-Americans is valuable information to non-African-Americans in and of itself.

VI UNIVERSITIES HAVE FIRST AMENDMENT RIGHTS TO STRUCTURE THEIR ADMISSIONS POLICIES TO PRODUCE GREATER DISCUSSION AND DEBATE OF IDEAS

Mr. Justice Powell noted in Bakke, 438 U.S. 265 at 312, that:

> Academic freedom, though not a specifically enumerated constitutional right, has long been viewed as a special concern of the First Amendment. The freedom of the University to make its own judgments as to education includes the selection of its student body.

Mr. Justice Powell quotes Mr. Justice Frankfurter as summarizing the "four essential freedoms" that constitute academic freedom:

> It is the business of the university to provide that atmosphere which is most conductive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957), concurring in result. (BAKKE SITE, same page at 312)

Mr. Justice Powell quotes Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), on "our national commitment to the safeguarding of these freedoms within university communities:"

> Our nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That

> freedom is therefore a special concern of the First Amendment…. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues (rather) than through any kind of authoritative selection." U.S. v. Associated Press, 52 F.Supp 362-372.

Mr. Justice Powell similarly notes that in the seminal anti-discrimination case of Sweatt v. Painter, 339 U.S. at 634, the Court said similarly:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

The cause of academic freedom has been especially compelling to the U.S. Congress and the legislatures of the fifty states. Neither the U.S. Congress nor a single state legislature in the United States has – without pressure of a court decision or voter referendum – passed a law impinging on the right of a university to have a diversity program taking race into account. The lack of state action in Michigan to overturn the admissions policies of the University of Michigan speaks volumes as to the

general societal acceptance of the right of a university to make its own admissions decisions.

The right of institutions in general to make decisions within their own field of competence has been upheld by the U.S. Supreme Court in First Amendment cases the past. For instance, this Court has upheld the right of newspapers not to publish corrective letters to the editor, and the right of political parties to limit their nomination process to party members. (See: Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) and California Democratic Party, et al. v. Bill Jones, 530 U.S. 567 (2000).)

Admissions policies are as fundamental to universities as free selection of submitted material is to newspapers and determining eligibility to vote in political primaries is to political parties.

This Court should reaffirm Justice Powell's wise reasoning and continue to find a clear basis in the First Amendment for the achievement of full diversity in education.

VII REMEDIES SUGGESTED BY THE SOLICITOR GENERAL CONSTITUTE A CONSTITUTIONAL REGRESSION IN THE DIRECTION OF PLESSY v. FERGUSON AS THEY REWARD THE CHOICE OF LOW PRESTIGE SCHOOLS BY AFRICAN-AMERICANS

The decision of Mr. Justice Powell in Bakke gave a critical fifth vote to the idea that racial quotas violate the Fourteenth Amendment. In so doing, Mr. Justice Powell prohibited attempts to give African-Americans a right to a number of admissions slots, and merely gave universities a right to establish diverse admissions policies.

The ruling of Justice Powell in Bakke was balanced, moderate, and minimalistic. It has been widely accepted by educational institutions throughout the United States. While it has helped many African-Americans gain admissions compared to what would have been the case had there been a total ban on the consideration of race, it has helped African-Americans only to the degree that doing so helps improve the educational experiences of fellow students of other races.

The percentage of African-Americans in law schools and in the legal profession has remained far below their

percentage in the American population and their percentage of American college graduates.

The balanced, moderate and minimalistic ruling of Justice Powell is now being attacked by many critics as being "functionally" a constitutionally prohibited quota. The "proof" of this allegation is that the number of African-American students stays within an observable range for a number of years.

The search for "functional quotas" is a slippery slope. The states of Texas and Florida both claim that their "racially neutral" plans have not lead to significant reductions in the number of African-American students. They say that diversity is constitutionally allowable as long as it achieved by racially neutral means.

But the Texas and Florida arguments are vulnerable to the "functional quota" argument, if that argument is to be taken seriously. If Texas and Florida can prove that African-American enrollment is similar to what it otherwise would be if race was considered a factor, it is only a matter of time before their plans, too, are challenged as "functional quotas" by one or

more of the amicus petitioners who want the consideration of diversity to be totally prohibited.

The Solicitor General attempts to bridge the gap between the states and diversity's stronger critics. The Solicitor General's approach is to encourage African-Americans to attend low-prestige schools, where they would arguably fare better.

This approach is reminiscent of the approach of advocates of segregation in Brown v. Board of Education, 347 US 483 (1954). The defendants in Brown produced witnesses stating how segregation benefited African-Americans. As the Amicus Curiae of the Center for Equal Opportunity, the Independent Women's Forum, and the American Civil Rights Institute notes (pp.23-24), backers of segregated schools included a child psychiatrist who testified that: "when the two groups are merged, the anxieties of one segment of the group are quite automatically increased, and the pattern of the behavior of the group is that the level of group behavior drops," and the chairman of the department of psychology at Columbia University who argued that "the Negro would be

much more likely to develop tensions, animosities, and hostilities in a mixed school than in a separate school."

Florida's Amicus Curiae brief (pp. 10-11) notes that:

> only law school admissions experienced a slight decline (in total minority enrollment) of 0.03% (from 24.63% in 2000-2001 to 24.60% in 2001-2002. However, the state has just authorized two new law schools at Florida International University (FIU) and Florida Agricultural and Mechanical University. These schools will increase opportunities for minorities to attend. By way of example, the inaugural class at the FIU law school was 44% Hispanic-American and 8% African-American.
>
> The Texas diversity program focuses on getting the top

students in each school, "focusing on attracting the top graduating students from throughout the state" in the words of the Amicus Brief of the Solicitor General (p.4). Therefore, segregated schools are bound to have African-Americans qualifying for admission, while non-segregated schools are likely to have far fewer African-Americans qualifying for admission. Rewarding African-American students for attending segregated schools – even though segregated schools are not segregated by law after Brown v. Board of Education –

is a clear step in the direction of taking state action unconstitutionally in support of de facto segregation.

VIII CONCLUSION -- ANY REMEDIES SHOULD BE AIMED AT HELPING PLAINTIFFS BARBARA GRUTTER AND HER CLASS, NOT REDUCING OPPORTUNITIES FOR AFRICAN-AMERICAN LAW STUDENTS

Abolishing the diversity program at the University of Michigan School of Law would only minimally affect Barbara Grutter and her class, raising her chances of admission from 40% to 44%. (Judge Friedman's Opinion, p.29, quoting Dr. Stephen Raudenbush, professor of education, University of Michigan.)

Judge Friedman declined to award her monetary damages, and, unlike in the case of Alan Bakke, who was admitted to attend the Davis Medical School as his litigation proceeded, there is no mention in Judge Friedman's opinion of any motion to order the University of Michigan School of Law to admit Ms. Grutter. Her personal interests – and her personality – seem to be buried under the piles of paper this case has necessitated.

Currently, the University of Michigan School of Law has no evening program (see: Jerry Bobrow, Ph.D., Barron's How to Prepare for the LSAT, 10th Ed. (2002), p.597). A remedial order could be to have the school establish one, to open up opportunities for Ms. Grutter, her class, and others, who might prefer to attend school in the evening.

Other potential orders could be to give students over 40 extra points in the admission process, to give students with strong geographical ties to the area points if going to law school elsewhere would cause hardship, or to order the University of Michigan to open a second campus in another part of the state as law schools elsewhere have done.

Petitioners in Amicus Curiae are not motivated by a desire to keep Ms. Grutter and her class out of the University of Michigan School of Law. They seek instead to keep African-Americans and other minorities in the University of Michigan School of Law in the interests of both the First and Fourteenth Amendments.

Respectfully submitted,

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